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No. 89-17

In the Supreme Court of the United States

OCTOBER TERM, 1989

PROFESSIONAL CABIN CREW ASSOCIATION, GLENDA LOPEZ-BRUNER, AND DELYNN KLOSTERHOFF, PETITIONERS

v.

NATIONAL MEDIATION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should reconsider the standards governing judicial review of National Mediation Board determinations established by the decisions in *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 671 (1965), and *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943).

2. Whether the court of appeals properly rejected petitioners' claims that the National Mediation Board violated express statutory provisions of the Railway Labor Act (a) by including certain former strikers seeking reinstatement in a list of "potentially eligible" voters in a representation election, and (b) by the manner in which the Board investigated petitioners' representation application.

3. Whether the scope of judicial review of the National Mediation Board's dismissal of petitioners' representation application violated their First or Fifth Amendment rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 872 F.2d 456. The memorandum of the district court (Pet. App. 20a-26a) is unreported. The opinion of the National Mediation Board (Pet. App. 28a-37a) is reported at 15 N.M.B. 11.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1989. The petition for a writ of certiorari was filed July 5, 1989. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, creates a comprehensive plan for the resolution of labor-management disputes in the rail and air transportation industries. See 45 U.S.C. 151a. The Act guarantees employees "the right to organize and bargain collectively through representatives of their own choosing." 45 U.S.C. 152 Fourth. The Act further provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." *Ibid.*

Section 2 Ninth of the Act, 45 U.S.C. 152 Ninth, charges the National Mediation Board with the responsibility for resolving labor representation disputes under the Act. A party seeking certification as a bargaining representative may apply to the Board for an "investigation" to determine the employees' wishes. Section 2 Ninth does not specify the procedures for the Board to use in conducting an investigation. Instead, it provides that "[i]n such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved," and that "[i]n the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election."

2. On March 7, 1986, flight attendants at Trans World Airlines, Inc. (TWA), represented by respondent International Federation of Flight Attendants (IFFA), went on strike. During the strike, TWA continued operations by using a combination of newly-hired permanent replacements and flight attendants willing to cross the picket lines. Pet. App. 20a. On May 17, 1986, IFFA called off the strike and made an unconditional offer for its members to return to work. *Id.* at 32a. TWA accepted 196 of the former strikers back on the job immediately. *Id.* at 2a. The rest were placed

on a preferential rehire list, to be recalled to active duty on a seniority basis as vacancies arose. *Ibid.*

IFFA then filed two actions seeking immediate reinstatement with back pay for its members who were former full-term strikers. In the first action, IFFA alleged that its members were not "economic strikers," but were "unfair labor practice strikers" entitled to reinstatement under principles developed in interpreting the National Labor Relations Act. That claim was later rejected by the district court, *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, 682 F. Supp. 1003 (W.D. Mo. 1988), and the court of appeals affirmed, 878 F.2d 254 (8th Cir. 1989). In IFFA's second action, approximately 1,500 strikers alleged that even if they were economic strikers, they were entitled to reinstatement under the Railway Labor Act or under the terms of the collective bargaining agreements. That claim ultimately was rejected by this Court in *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989).

Some months after the strike, and long before the resolution of IFFA's legal actions seeking reinstatement for its members, the National Mediation Board received several applications alleging a representation dispute among TWA's flight attendants pursuant to Section 2 Ninth. The first application followed TWA's merger with Ozark Air Lines. The Association of Flight Attendants (AFA), which represented Ozark's flight attendants, filed a petition with the Board to determine whether AFA was still certified to represent the former Ozark flight attendants. In November 1986, IFFA filed a representation petition seeking to resolve essentially the same issue. In December 1986, petitioner Professional Cabin Crew Association (PCCA) filed a request for intervention in the petition filed by IFFA, stating that its purpose was to challenge IFFA as representative of the TWA flight attendants. Pet. App. 3a.

On May 7, 1987, after six days of hearings, the Board concluded that AFA's representation of the former Ozark flight attendants had terminated as a result of the merger. Both AFA and IFFA then withdrew their representation petitions. Pet. App. 3a. The Board gave notice to PCCA of its right to convert its intervention application to a representation application. Because the class of flight attendants PCCA sought to represent was already represented by a union, under applicable Board regulations, 29 C.F.R. 1206.2, PCCA was required to support its representation application with authorization cards signed by a majority of the class. Pet. App. 3a-4a.

On July 30, 1987, PCCA filed an amended application supported by authorization cards signed by a majority of the currently employed TWA flight attendants. Pet. App. 4a. The Board appointed a representative to investigate PCCA's application. After conducting his investigation, the Board's Representative concluded that not only the current employees, but also the former strikers then seeking reinstatement were presumptively entitled to vote in the election. Taking into account the former strikers as well as the currently employed flight attendants, the Representative determined that the class of flight attendants included 9,328 potentially eligible voters (after consideration of challenges to particular flight attendants by the parties). Pet. App. 33a. PCCA's showing of support represented less than a majority of that number. PCCA then appealed to the Board from the Representative's inclusion of the former strikers in the list of potentially eligible voters. *Id.* at 4a.

3. On November 10, 1987, the Board ruled 2-1 that the Representative's determination regarding the composition of the list of potentially eligible voters was correct. Accordingly, the Board dismissed PCCA's representation application for its failure to include a sufficient showing of interest

from a majority of the flight attendants in the class. Pet. App. 34a.

The Board explained in detail its reasons for upholding the Representative's inclusion of the former strikers in the list of potentially eligible voters. Citing *IFFA* v. *Trans World Airlines, Inc.*, 819 F.2d 839, 842 (8th Cir. 1987), rev'd in part on other grounds, 109 S. Ct. 1225 (1989), the Board stated: "It is established that '[e]mployees who are not working because of a labor dispute remain 'employees' of the employer.' " Pet. App. 33a. The Board also referred to a long line of its own precedents holding that strikers "may be eligible voters even if the employer hires replacement workers." *Ibid.* (citing *El Al Israel Airlines*, 12 N.M.B. 238 (1985); *Altair Airlines*, 7 N.M.B. 507 (1980); *Wein Air Alaska*, 6 N.M.B. 701 (1979); *Florida East Coast Ry.*, R-3869 (Jan. 17, 1967) and R-3819 (Mar. 3, 1966)). Finally, relying on its own regulations, 29 C.F.R. 1206.6, and on its decision in *Eastern Airlines*, 4 N.M.B. 24 (1964), the Board explained that the former strikers should be included as potentially eligible voters because they had filed an action that sought reinstatement for their alleged wrongful dismissal and that action was pending in district court. Pet. App. 33a-34a. For all of those reasons, the Board "decline[d] to disenfranchise the former strikers as urged by PCCA." *Id.* at 34a.

4. In December 1987, petitioners filed a complaint in the United States District Court for the District of Columbia to challenge the Board's decision not to hold a representation election. Petitioners argued that the Board's decision violated the Act in three respects. First, petitioners contended, the Board's conclusion that the former strikers were eligible to vote was inconsistent with the definition of "employee" set forth in Section 1 Fifth of the Act, 45 U.S.C. 151 Fifth. Second, petitioners claimed that the Board had failed to satisfy its duty to "investigate" the actual eligi-

bility of the former strikers to vote in a representation election, as required under Section 2 Ninth. Third, petitioners argued that the Board erred by dismissing PCCA's intervention petition and by refusing to accept PCCA's 35% showing of interest. Pet. App. 23a.

The district court granted the Board's motion for summary judgment. The court began by noting that "[j]udicial review of NMB decisions is one of the narrowest known to the law." Pet. App. 23a (quoting *International Ass'n of Machinists* v. *Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir.), cert. denied, 109 S. Ct. 62 (1988)). "[I]n the absence of a showing of a gross violation of the Railway Labor Act or a denial of a constitutional right," the court observed, "[c]ourts have no authority to review NMB decisions." Pet. App. 23a. Applying those principles, the court examined petitioners' claims and concluded that the Board did not violate any express provision of the Act. *Id.* at 23a-25a. The court found that the Board had discretion to determine that the replaced strikers had close enough ties with TWA to be considered potentially eligible voters under the Act. *Id.* at 23a-24a. The court also found that the Board had satisfied its statutory duty to investigate the current eligibility of the former strikers, both as a group and individually. *Id.* at 24a-25a. Finally, the court found that the Board's decision to require a majority showing of interest by PCCA "was well within its discretion and violates no express provision of the Railway Labor Act." *Id.* at 26a. Consequently, the court dismissed petitioners' complaint.

5. The court of appeals affirmed. Pet. App. 1a-19a. Relying on *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943) (*Switchmen's Union*), and *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 671 (1965) (*Railway Clerks*), the court of appeals noted that judicial review of National Mediation Board decisions is "extraordinarily

limited." Pet. App. 6a. The court explained that under well-established principles governing the review of Board decisions, the "[c]ourts have authority to review [such] determinations only upon a 'showing on the face of the pleadings that the certification decision was a gross violation of the [Act] or that it violated the constitutional rights of an employer, employee, or Union,' " *ibid.* (quoting *International Ass'n of Machinists* v. *Trans World Airlines*, 839 F.2d at 811). In implementing that principle, the courts may only take a " 'peek at the merits' to determine if the NMB has committed an error of 'constitutional dimension or a gross violation of the statute.' " Pet. App. 6a. Unless this process reveals an error that is "obvious on the face of the papers . . . without extension to 'arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide,' " the courts lack power to proceed further with the case. *Ibid.* (quoting *Railway Clerks*, 380 U.S. at 671).

In light of that established framework, the court of appeals, after a careful analysis of petitioner's allegations, found "neither a complaint of constitutional dimension nor a gross violation of the statute." Consequently, the court held, the Board's decision "is not reviewable." Pet. App. 19a.

ARGUMENT

The court of appeals' decision is correct and, indeed, is compelled by this Court's decisions in *Railway Clerks* and *Switchmen's Union*. Petitioners offer no sound reason for this Court to reconsider, let alone depart from, the principles announced in those cases. Because the court properly applied *Railway Clerks* and *Switchmen's Union* to the particular facts, and because there is no conflict between this decision and any decision of this Court or another court of appeals, further review is not warranted.

1. Forty-six years ago, this Court made clear in *Switchmen's Union* that the determinations of the National Mediation Board in resolving labor disputes under the Railway Labor Act are generally not subject to judicial review. 320 U.S. at 300. As the Court explained in that case, Congress entrusted the responsibility for protecting the collective bargaining rights secured by the Railway Labor Act exclusively to the Board, not to the courts. Consequently, absent a showing that the failure to provide access to the courts would result in "a sacrifice or obliteration of a right which Congress has created" (*ibid.*), the Board's determinations are unreviewable because a dispute "was to reach its last terminal point when the administrative finding was made. There was to be no dragging out the controversy into other tribunals of law." *Id.* at 305.[1]

Twenty-two years later, in *Railway Clerks*, this Court reaffirmed the fundamental principles of *Switchmen's Union*. The Court noted with approval that *Switchmen's Union* had refused to consider whether the Board had correctly determined the scope of the "craft or class" of employees for purposes of holding an election because "it was for the Board, not the courts, finally to resolve such questions." 380 U.S. at 659. The *Railway Clerks* Court, however, undertook to review a claim that the Board had failed to "perform[ ] its statutory duty to 'investigate' the dispute." *Id.* at 662. After reviewing the Board's actions

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[1] The Court made much the same point in the companion case to *Switchmen's Union, General Committee* v. *M.-K.-T. RR.*, 320 U.S. 323, 336 (1943) (footnotes omitted): "However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive."

to resolve the dispute in question, the Court held that the Board had carried out its statutory responsibility to investigate and that "[i]ts determination * * * is not subject to judicial review." *Id.* at 668.

In its more recent cases, the Court has not questioned the continued vitality of *Switchmen's Union* and *Railway Clerks*. Just last Term, in a case growing out of the same labor dispute that produced the instant petition, this Court took pains to restate the governing principles of *Switchmen's Union* in declaring that "we have understood judicial intervention in RLA procedures to be limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress has written into the Railway Labor Act.' " *Trans World Airlines* v. *Independent Federation of Flight Attendants*, 109 S. Ct. at 1234 (quoting *Switchmen's Union*, 320 U.S. at 300).[2]

Petitioners point to no circuit conflict on the scope of judicial review of Board representation decisions, and we are aware of none. The courts of appeals have uniformly held that such decisions, made incident to the Board's investigatory function, are not reviewable. See, *e.g.*, *Aeronautical Radio, Inc.* v. *National Mediation Bd.*, 380 F.2d 624, 626-627 (D.C. Cir.) (per curiam) (meaning of "majority"), cert. denied, 389 U.S. 912 (1967); *WES Chapter Flight Engineers, International Ass'n* v. *National Mediation Bd.*, 314 F.2d 234, 236-237 (D.C. Cir. 1962) (voting

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[2] Cf. *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958) (recognizing that the principles of *Switchmen's Union* were "controlling" and holding that review was available where the agency acts "in excess of its delegated power and contrary to a specific prohibition in the Act").

eligibility of employees who walked off job).[3] Only on rare occasions, as petitioners note (Pet. 8 n.9), have the courts stepped in to review Board representation decisions when appropriate under the standards established by this Court. *Russell* v. *National Mediation Bd.*, 714 F.2d 1332 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984); *International In-Flight Catering Co.* v. *National Mediation Bd.*, 555 F.2d 712 (9th Cir. 1977).

Against that background, petitioners' suggestion (Pet. 9-16) that this Court reconsider *Switchmen's Union* is without merit. None of the considerations for departing from the rule of stare decisis is applicable here. Cf. *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363, 2370-2371 (1989); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). The principal reason adduced by petitioners in urging this Court to overrule *Switchmen's Union* is that three years after this Court decided that case, Congress enacted the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, which embodies a general policy in favor of judicial review of agency action. Pet. 10-11. In relying on the APA, however, petitioners ignore that this Court reaffirmed the holding of *Switchmen's Union* in *Railway Clerks*—many years after the enactment of the APA—and has continued to adhere to it in recent cases, see *Trans World Airlines* v. *Independent Federation of Flight Attendants*, 109 S. Ct. at 1234.

Moreover, this Court has recognized in other contexts that the APA did not obliterate all traditional limitations on judicial review that evolved before the APA's enactment.

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[3] See also *Zantop Int'l Airlines, Inc.* v. *National Mediation Bd.*, 732 F.2d 517 (6th Cir. 1984); *British Airways Bd.* v. *National Mediation Bd.*, 685 F.2d 52 (2d Cir. 1982); *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Bd.*, 574 F.2d 394 (8th Cir.), cert. denied, 439 U.S. 881 (1978).

ICC v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (discussing the relevance of pre-APA traditions of nonreviewability in construing the APA's exception for agency action that is "committed to agency discretion by law" (5 U.S.C. 701(a)(2)); *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985) (same); see also *Webster* v. *Doe*, 108 S. Ct. 2047, 2057 (1988) (Scalia, J., dissenting) ("[W]e have continued to take into account for purposes of determining reviewability, post-APA as before, not only the text and structure of the statute under which the agency acts, but such factors as * * * whether it is the sort of decision that has traditionally been non-reviewable."). The same considerations apply here. The *Switchmen's Union* doctrine is a well-established component of the law governing review of the National Mediation Board's activities, has never been revised by Congress in the years since it was announced, and has produced no untoward consequences in the administration of the Railway Labor Act. Petitioners have identified no adequate reason for this Court to reconsider that doctrine.[4]

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[4] Petitioners' assertion (Pet. 13-16) that the standard of review applied in *Switchmen's Union* and *Railway Clerks* is toothless is simply incorrect. As the analysis conducted by the court of appeals in this case demonstrates, the courts take seriously their responsibility to ensure that the express commands of the Railway Labor Act are honored by the Board. See Pet. App. 7a-19a. What the courts have properly resisted, however, under the aegis of *Switchmen's Union* and *Railway Clerks*, is what petitioners apparently desire: the judicial determination of discrete policy issues regarding the application of the Act, rather than the development of the law regarding such matters by the agency charged by Congress to administer the Act. Petitioner's approach would frustrate Congress's decision to entrust Railway Labor Act matters to the Board, and is out of harmony with the prevailing concepts governing judicial review of agency action, cf. *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Petitioners next contend (Pet. 17-20) that the court of appeals misapplied *Switchmen's Union* in concluding that the Board actions in this case were not reviewable. Petitioners' argument is principally that the Board violated express commands contained in the Act and that the courts should have rectified this violation. Both courts below properly rejected that claim. Pet. App. 7a-19a; *id.* at 23a-26a.

Petitioners place primary reliance on Section 1 Fifth of the Act, 45 U.S.C. 151 Fifth, arguing that the definition of "employee" is an express statutory command that the Board transgressed in determining to include the former strikers on the list of potentially eligible voters. Section 1 Fifth begins with the introductory phrase "[t]he term 'employee' * * * *includes*," and goes on to describe as covered persons "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission * * *." *Ibid.* (emphasis added). Contrary to petitioners' contention, that definition does not preclude the Board from considering former strikers who are seeking reinstatement as "employees." While Section 1 Fifth contains a proviso excluding a particular category of workers (coal miners) from coverage, it contains no similar exclusion of former strikers.[5] *Ibid.* In light of the generality of the statutory scheme, the Board plainly enjoys a degree of latitude in determining

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[5] Contrary to petitioners' suggestion (Pet. 13-14, 15), the distinction noted in our brief in *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, No. 87-548, at 16-17 n.10, between the wording of the National Labor Relations Act and that of the Railway Labor Act with regard to the definition of "employee" does not establish that the Board's decision disregarded an express statutory mandate. Our brief proposed no conclusion on that point, nor does the statute supply an explicit answer.

the proper composition of a voting class when former strikers are seeking reinstatement and are on preferential rehire lists.[6]

In rejecting petitioners' contention, the district court reasoned that the Act "simply sets forth the indicia relevant to the existence of an employment relationship" and leaves it up to the Board to exercise discretion in light of varying factual settings. Pet. App. 24a. The court of appeals found no flaw in this logic, and further noted that petitioners' construction would have the untenable consequence of excluding "from the definition of employees not only former strikers, but furloughees, individuals on leaves of absence, and dismissed employees with pending claims for reinstatement." *Id.* at 8a. That "extreme position has been rebuffed by the Board and courts alike." *Ibid.* (citing *Nashville C. & St. L. Ry.* v. *Railway Employees' Dep't*, 93 F.2d 340, 342 (6th Cir. 1937), cert. denied, 303 U.S. 649 (1938)).

The Board's decision to include the former strikers here also deserved deference because it reflected the Board's established construction of the Act. Under a Board regulation, 29 C.F.R. 1206.6, promulgated more than 40 years ago, 12 Fed. Reg. 3083 (May 10, 1947), the Board's policy has been to accord voting rights to "[d]ismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities."[7] Moreover,

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[6] As noted above, page 2, 196 of the former strikers were rehired immediately; moreover, by the time of the Board decision, approximately 800 had been recalled. Pet. App. 2a.

[7] 29 C.F.R. 1206.6 provides: "Dismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities * * * are eligible to participate in elections among the craft or class of employees in which they are employed at the time of dismissal." The principles underpinning this regulation were applicable here, even though the claims of the particular flight attendants who were seeking reinstatement were ultimately denied.

the decision is consistent with the applicable case law. See *Nashville C. & St. L. Ry.* v. *Railway Employees' Dep't*, 93 F.2d 340 (6th Cir. 1937), cert. denied, 303 U.S. 649 (1938). Cf. *Brotherhood of Ry. & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246-247 (1966) (collective bargaining agreement represents the "rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation"); *Pennsylvania Railroad* v. *Day*, 360 U.S. 548, 552 (1959) (retired worker does not cease to be an "employee" under the RLA for purposes of resolving a dispute over compensation initiated during worker's employment); *Air Line Pilots Ass'n* v. *Alaska Airlines, Inc.*, 735 F.2d 328, 329 (9th Cir. 1984) (same conclusion as to worker who seeks retirement benefits after his retirement); *Air Line Pilots Ass'n International* v. *United Air Lines*, 614 F. Supp. 1020, 1041 (carrier has the right to hire replacements during a strike but also has duty to maintain its employment relationship with the strikers because "[t]hat relationship, like the collective bargaining agreement which memorializes the relationship, 'is not destroyed by the strike' "), later proceeding, 616 F. Supp. 849 (N.D. Ill. 1985), modified, 802 F.2d 886 (7th Cir. 1986), cert denied, 480 U.S. 946 (1987).

Petitioners also contend that the Board violated the express statutory command to "investigate" a dispute. Cf. *Railway Clerks*, 380 U.S. at 661. The courts below properly rejected that contention. The Act, in Section 2 Ninth, requires the Board to certify the results of its investigation "within thirty days after the receipt of the invocation of its services." "[S]peed" of resolution by the Board is "an objective of the first order." *Railway Clerks*, 380 U.S. at 668. In this case, the Board, in the limited time frame contem-

plated by the statute, fully investigated the situation; determined that the former strikers had a sufficient interest in the election's outcome to be potentially eligible voters; and allowed the parties the opportunity—which they used—to challenge the interest of particular replaced strikers.[8]

3. Finally, petitioners advance (Pet. 20-22) a claim that the application of *Switchmen's Union* to this case somehow denies the flight attendants of TWA an adequate opportunity to select a bargaining representative, in violation of the First and Fifth Amendments. There is no violation of the First Amendment in entrusting the supervision of elections in the rail and air transportation industries to the Board. Congress's assignment of that task to the Board, subject to limited judicial review, no more violates the constitutional rights of employees here than it did in *Switchmen's Union* itself. The Board has simply defined the universe of employees from which a majority may select a representative. Petitioners' interest in the determination of a representative was adequately protected by that procedure. See *International Ass'n of Machinists* v. *Trans World Airlines*, 839 F.2d at 812 (rejecting analogous claim).

Petitioners fare no better with their claim that the Board's procedures in this case violated the Due Process Clause. Petitioners had ample notice and an opportunity to be heard by the Board's Representative, enjoyed an appeal to the Board itself, and obtained the determination by two courts

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[8] Petitioners also suggests in passing (Pet. 17) that the *Switchmen's Union* standard of review should be confined to its particular facts: a determination by the Board of whether to divide a carrier's employees into more than one "craft or class." But the rationale of *Switchmen's Union* fully applies here. The importance of avoiding protracted litigation that would undermine the Board's authority in settling labor disputes is not limited to the determination of a "craft or class." See *General Committee* v. *M.-K.-T. RR.*, 320 U.S. at 336.

that the Board did not transgress its proper zone of authority. That process was entirely sufficient to satisfy the Constitution.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] We note that petitioner PCCA is not foreclosed from filing a representation petition with the Board in light of changed circumstances. Not only have almost two years passed since the Board's determination, but the former strikers' legal actions seeking reinstatement have been decided adversely to them. See page 3, *supra*. PCCA may at any time submit current authorization cards in support of an election application, and the Board will consider the application in light of contemporary conditions.

* The Solicitor General is disqualified in this case.

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